



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

June 13, 2001

SENSITIVE ALLEGATION MATERIAL --
REDACTED VERSION

The Honorable Edward J. Markey
United States House of Representatives
Washington, D.C. 20515-2107

Dear Congressman Markey:

I am responding to your letter dated May 22, 2001 concerning the termination of [], a former employee of a contractor (Robotech, Inc.) of the Nuclear Regulatory Commission ("NRC" or "Agency"), and related issues. [] asserts that his termination by the contractor resulted from his identification of serious violations of law related to the contract. As you know, he has filed a complaint pursuant to 41 U.S.C. 265 that authorizes an agency to provide remedial relief for a complainant who establishes that he or she has been subjected to reprisal prohibited by that statute. The NRC Office of Inspector General (OIG) investigated [] complaint and issued its report of findings on June 4, 2001. Pursuant to the statute's implementing regulations, [], as well as the contractor, is allowed a thirty-day period to submit a written response to the report to the Agency. OIG also issued an investigative report concerning the alleged misconduct of certain Regional managers associated with [] complaint. This report is not publicly available and is currently being evaluated.

You express particular concern about the correspondence of March 28, 2001, to [] attorney from Ellis W. Merschoff, Regional Administrator, NRC Region IV. You believe this letter suggests that Mr. Merschoff has been delegated the responsibility to review the results of the OIG investigation and determine appropriate Agency action. Because the complaint included questions about the involvement of the Region IV Administrator in the underlying matter, you do not believe that he should be the official authorized to review the results of the investigation and decide upon the appropriate action. I share your concern. The letter was not intended to reflect a decision regarding the NRC official who will be responsible for reviewing the OIG report and for formulating appropriate action. Because the Regional Administrator's involvement in the matter is questioned in the complaint, he will not be involved in conducting the Agency's review of the investigation into his own conduct. Accordingly, the Agency's decision in this matter will be assigned to an Agency management official outside of NRC Region IV. [] attorney was so advised in a letter dated May 31, 2001.

You also express concern that NRC employees have contacted your office to complain of an atmosphere of harassment and unprofessional conduct. You suggest that a safety-conscious work environment may not be in place in the NRC.

I am not privy to the specific allegations that have been brought to the attention of your office by NRC employees in Region IV. However, the NRC has established various ways by

which NRC employees can raise concerns of systemic unlawful or otherwise significant inappropriate management practices in a major NRC office, such as Region IV. These processes include: (1) the grievance procedure under the Collective Bargaining Agreement between the Agency and its employee union (culminating in binding arbitration); (2) the Labor-Management Partnership Process, which provides a vehicle for headquarters management, as well as management in local offices such as Region IV, to meet periodically with their union counterparts to discuss issues of concern to employees; (3) the equal employment opportunity complaint procedure, which provides a means for formal and informal resolution of employee EEO concerns, culminating in a review by the Equal Employment Opportunity Commission; (4) the Differing Professional Opinion (DPO) process (NRC Management Directive 10.159), through which employees may express views or opinions that are different from the position of NRC management and have those opinions reviewed in a meaningful and productive fashion; (5) the NRC Open Door Policy (NRC Management Directive 10.160), which formally provides employees the right to meet individually with NRC officials at any level of the Agency to express concerns about any work-related matter related to their employment; (6) Regional Office procedures for handling allegations of improper actions by NRC staff or NRC contractors; (7) investigation by the NRC Inspector General, who is available to receive complaints or concerns by any individual, including employees, regarding alleged fraud, waste, abuse or misconduct by Agency officials within the purview of the Inspector General Act of 1978, as amended; and (8) processes established by the United States Office of the Special Counsel (OSC), which investigates allegations of prohibited personnel practices, including whistleblower retaliation, by Federal agencies. The processes are described in Agency issuances that are readily available to all employees. Information regarding the OSC is available to NRC employees in hard copy form and is also available through the OSC home page.

As a result of your letter, knowledgeable staff members were asked to identify issues relating to an atmosphere of harassment and unprofessional conduct in Region IV that have been raised over the past few years. This review did reveal some concerns regarding management practices in the Division of Resource Management and Administration (DRMA), the organizational segment of Region IV that provides administrative support services. First, in "open door" or other informal meetings with Region IV management in late 1999, several DRMA employees advised management of the need to address the perception that DRMA management did not treat employees equally and fairly. Moreover, the employees suggested that DRMA management needed to enhance its efforts to encourage employees to provide feedback on how the administrative support operation could be improved. (The employees also offered suggestions for operational and organizational improvement that could enhance the services provided by that organization.) I am advised that appropriate interaction between DRMA staff and Regional management has occurred, and that generic and specific measures have been, and will continue to be taken to address these issues.

The second concern surfaced in two EEO complaints, filed in June and October of 2000 by another employee in DRMA. In one complaint, the employee alleged (among other things) that he was subject to retaliation for advising OIG of allegedly false time records submitted to the Agency by a contractor. This allegation was referred to the OIG, which subsequently advised that the evidence did not support the allegation of false time records. OIG also advised that it discussed the allegation of retaliation with the employee and the employee decided to withdraw it. In a second complaint, the employee alleges that his non-selection for a position with the Agency was motivated in part by reprisal for his having filed the earlier complaint. This issue is now being evaluated in accordance with existing EEO complaint procedures.

I am advised that the employee concerns identified above do not involve safety issues, or alleged retaliation for identifying safety issues, and are limited to concerns within DRMA. As indicated, Region IV management is working with DRMA management and employees to enhance the work environment within that Division. Moreover, I am encouraged that Region IV actively promotes employee use of the Open Door and DPO procedure. In fact, Regional management advises that it has recognized employee use of these processes by providing cash awards to those who have used the processes to focus Agency attention on meaningful safety or policy issues. Further, I am advised that Region IV has implemented a "non-concurrence policy" that permits employees to decline to concur in any inspection report arising from an inspection of a licensee's program and performance, thereby permitting employees to raise any concerns to management without invoking the DPO procedure.

Finally, I am advised that the U.S. Office of Special Counsel has not brought to management's attention any concerns about improper personnel management practices, including whistleblower retaliation, in Region IV.

In light of your letter, I have alerted appropriate Agency staff who oversee the various complaint processes to be especially sensitive to matters regarding management practices or the work environment in Region IV that may surface in the future. The Commission is prepared to act if there is a need for timely and effective management intervention.

I have responded to your eight specific questions in the enclosure to this letter. I appreciate your letter and your interest in the NRC.

Sincerely,

/RA/

Richard A. Meserve

Enclosure: Responses to Questions

ENCLOSURE

Question (1):

What programs does the NRC have in place to raise awareness of proper handling of employee or contractor disclosures by managers employed by the NRC itself? Have these ever been reviewed to assess their effectiveness?

Answer:

The processes by which employees may raise disclosures to management include the following: (1) the grievance procedure under the Collective Bargaining Agreement between the Agency and its employee union (culminating in binding arbitration); (2) the Labor-Management Partnership Process, which provides a vehicle for headquarters management, as well as management in local offices such as Region IV, to meet periodically with their union counterparts to discuss issues of concern to employees; (3) the equal employment opportunity complaint procedure, which provides a means for formal and informal resolution of employee EEO concerns, culminating in a review by the Equal Employment Opportunity Commission; (4) the Differing Professional Opinion (DPO) process (NRC Management Directive 10.159), through which employees may express views or opinions that are different from the position of NRC management and have those opinions reviewed in a meaningful and productive fashion; (5) the NRC Open Door Policy (NRC Management Directive 10.160) which formally provides employees the right to meet individually with NRC officials at any level of the Agency to express concerns about any work-related matter related to their employment; (6) Regional Office procedures for handling allegations of improper actions by NRC staff or NRC contractors; (7) investigation by the NRC Inspector General, who is available to receive complaints or concerns

by any individual, including employees, regarding alleged fraud, waste, abuse or misconduct by Agency officials within the purview of the Inspector General Act of 1978, as amended; and (8) processes established by the United States Office of the Special Counsel (OSC), which investigates allegations of prohibited personnel practices, including whistleblower retaliation, by Federal agencies. In order to provide awareness of the proper use of these processes, employees and managers are provided periodic reminders, including training by OIG (regarding the role of OIG, how to contact OIG, prohibition against retaliation), annual ethics training by the Office of the General Counsel that includes reporting and handling of alleged misconduct, and information regarding EEO complaint procedures. A copy of the grievance procedure is provided to each staff employee in the bargaining unit represented by the employee union.

The Open Door Policy, and Differing Professional Opinion policy, are reflected in formal NRC Management Directives that are available in hard copy throughout the Agency and are accessible through the Agency's home page. Information regarding the jurisdiction of the United States Office of the Special Counsel (OSC) is available to all employees through that Agency's home page on the web. Moreover, NRC employees have been provided information in the form of an Agency announcement and OSC publications describing the whistleblower protection program available to Federal employees.

Supervisors and managers receive periodic training and guidance, on a formal and informal basis, from the Office of Human Resources (HR) and the Office of General Counsel (OGC) on the proper handling and consideration of employee grievances and concerns.

There is periodic review and assessment of the effectiveness of these processes. The DPO policy provides for periodic review, by a special review panel, that formally reviews the

effectiveness of the process. This review occurs every five to seven years. In fact, the DPO policy is currently undergoing such a review. The efficacy of the grievance procedure is assessed by the union and management during re-negotiation of the collective bargaining agreement, which occurs approximately every three years. The NRC's EEO complaint process, including the Agency's policy on sexual harassment, is reviewed frequently to ensure that it is consistent with evolving policies and requirements of the EEOC. The Agency's EEO program, including the complaint process, is reviewed by NRC staff and the Commission in semi-annual EEO briefings.

The OIG's procedure for receiving complaints of fraud, waste and abuse and other misconduct covered by the Inspector General Act of 1978, as amended, is a process within the control of OIG and is not subject to Agency review. However, OIG works closely with Agency staff, consistent with a formal protocol for cooperation, to ensure that all instances of improper conduct within the jurisdiction of OIG, including misconduct of managers, is properly addressed and resolved.

The Agency is sensitive to concerns regarding harassment of any employee for utilizing the established processes for raising issues (safety-related or otherwise). The Agency's sensitivity on this issue has resulted in specific written provisions prohibiting retaliation. These appear, for example, in the Agency's DPO procedures, the grievance procedure, publications regarding the EEO complaint process, and the policy on sexual harassment.

The NRC also seeks to raise awareness of the proper handling of contractor disclosures to management. NRC has an Acquisition Certification and Training Program in place, which consists of eleven training modules covering specific subject areas in procurement. The

program includes a session entitled "Acquisition for Supervisors and Managers of Project Managers" that was designed specifically for the supervisors or managers of those managing NRC contracts. This training provides Agency managers and supervisors with an awareness of the roles and responsibilities of Project Officers and others involved in performing contract management activities including: monitoring contractor performance, providing advice and direction to the contractor, reviewing and approving required reports/products, alerting Agency officials of problems encountered, and evaluating contractor performance. The module also presents managers and supervisors with practical exercises to highlight proper management of contractor performance and appropriate communication between the NRC Project Officer and the contractor. As a result, supervisors and managers at NRC should be well aware of the appropriate handling of contract-related disclosures provided to them by contractor staff. As with all training of NRC staff, the program is reviewed periodically to ensure that pertinent issues are adequately addressed.

Question (2):

What NRC guidelines govern the communication between managers at the NRC and its contractors, such as U.S. Robotech, the company that employed []? Do the guidelines forbid or restrict any communication regarding legally protected activity by contract employees? Has there been a violation of those guidelines in this circumstance?

Answer:

Guidance covering communication between NRC and its contractors is contained in Federal Acquisition Regulations (FAR), NRC Acquisition Regulations (NRCAR), NRC's Management Directive entitled "NRC Acquisition of Supplies and Services," and various training programs provided to employees on acquisition-related topics. This guidance specifies that communications between the parties be limited to individuals with specific authority as defined under the contract and that such communication be consistent with the terms and conditions of the contract. This avoids situations in which contractor employees are directed to perform work by Agency officials who lack the authority to do so. Conversely, applicable procedures contemplate that contractor employees will report and communicate to those at the NRC with the legal authority to direct contractor performance on matters related to the contract. Specifically, NRC's regulations require that communications between its contractors and staff be accomplished through the Contracting Officer or the Contracting Officer's representative (Project Officer) named for each contract.

Applicable procedures do not prohibit or restrict communication regarding legally protected activity by contractor employees. As a general rule, when concerns arise under an NRC contract, contractors report those concerns to the Contracting Officer or, in matters involving alleged impropriety, contact OIG directly. At the time of award, NRC informs its contractors of the availability of the IG Hotline as a means of reporting waste, fraud and abuse within NRC programs and its contracting operations. Additionally, for Region-based contracts, contractors may use established regional procedures to raise concerns regarding improper actions by NRC staff or NRC contractors.

NRC also has a Differing Professional View (DPV) process to support the contractor's (or contractor personnel) expression of professional health and safety-related concerns associated with the contractor's work for the NRC that may differ from a prevailing NRC staff view, disagree with an NRC decision or policy position, or take issue with proposed or established Agency practices. The DPV process, described in the NRCAR, is designed to protect contractor (contractor personnel) disclosures on subjects associated with the contractor's work for the NRC that is related to the mission of the Agency, i.e. health and safety matters. A contract clause reflecting this process is included in cost-type contracts for technical assistance work that directly supports the health and safety mission of the Agency. The U.S. Robotech contract, which is a Fixed Price contract for IT support services, is not a contract of this type.

Whether there has been a violation of applicable guidelines regarding contractor communications in the [] complaint will be determined when the record in that matter is closed and all of the facts and circumstances are carefully reviewed.

Question (3):

According to 41 U.S.C. Sec. 265, if it is found that an employee of a contractor has been subjected to a reprisal for reporting "information relating to a substantial violation of law related to a contract" to "an authorized official of an executive agency", then the head of the executive agency may 1) "order the contractor to take affirmative action to abate the reprisal", 2) "order the contractor to reinstate the person to the position that the person held before the reprisal" and provide back pay and other employee benefits that would have been received in the absence of the reprisal, and/or 3) "order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses"

associated with seeking relief from the reprisal. If it is found that [] was terminated in retaliation for disclosures to the agency, will you take any or all of these actions against U.S. Robotech? Will you see that he is reinstated to his previous or a similar position in providing Information Technology support at Region IV?

Answer:

I believe it is premature to commit to a course of action by the Agency until the record is closed in the [] complaint. As indicated earlier, the OIG report of findings on this matter was issued to me on June 4. The parties are allowed a period of 30 days to provide written responses to the OIG's findings. Once the investigative process is completed, including any response to the OIG report that the parties may elect to submit, the Agency will carefully evaluate the relevant facts and circumstances reflected in the complete record. Following such evaluation, we will determine what remedy is warranted under the statute if we find that [] was terminated in violation of the statute.

Question (4):

Have there been any previous decisions made by the NRC pursuant to 41 U.S.C. Sec. 265? What were the circumstances that lead to those decisions? The statute indicates that the review should be made by the head of the agency, but, as I stated earlier, Mr. Merschoff appears to think that he will be reviewing the investigation. Has this role been delegated to him? If so, why? Notwithstanding the fact that he is the Regional

Administrator for Region IV, is it NRC policy to involve persons named in complaints in decisions pertaining to those complaints?

Answer:

There have been no previous decisions made by the NRC pursuant to the statute since no complaints have previously been received under the statute. However, NRC's policy is not to involve those named in complaints under section 265 in the decisionmaking process on those complaints. As indicated earlier, Mr. Merschhoff will not be involved in the decision on the complaint of [].

Question (5):

Before 41 U.S.C. Sec. 265 became law, what was the standard practice by the NRC to provide remedies to employees of contractors who had been found to have been retaliated against?

Answer:

NRC has not had a case in which an NRC contractor's employee has been found to be the target of retaliation. Accordingly, no associated remedies have been provided.

Question (6):

Were you aware of problems with the work environment at Region IV prior to this incident? Will you seek to determine if information on mismanagement at Region IV has been blocked from reaching your office? Why or why not? Will you conduct a review to determine if Region IV is adhering to and enforcing compliance with NRC policies regarding the establishment and maintenance of a safety-conscious work environment, as defined in 61 FR 24336, "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation", and other applicable NRC rules and regulations? Why or Why not?

Answer:

While I was aware of the issues raised in [] complaint, I was not aware of the concerns raised by the DRMA employees in Region IV, discussed in the cover letter. However, I have no basis to conclude that information regarding the DRMA employees' concerns was "blocked" from reaching my office. I am advised that the matter received appropriate attention by senior management at the Region and is being addressed with the knowledge and active involvement of headquarters staff and management. Accordingly, there was no need to involve my office in this instance.

You inquire whether there is a the need for me to conduct a review to determine whether NRC employees in Region IV feel comfortable raising safety issues without fear of retaliation. I believe that a concern of this kind, if it exists, would have been raised through one or more of the processes and procedures for airing such issues. Staff's review of the issues raised in the

various complaint processes, as described earlier, does not suggest a need for further inquiry at this time. Nonetheless, as indicated earlier, I have directed Agency staff to monitor issues raised through these processes in the future and to be especially sensitive to such matters.

Question (7):

What actions does the NRC take against employees who have been pursuing private and/or illegal business activities on the premises of NRC facilities? Have there been other cases such as the ones alleged by the complaint as having occurred at Region IV? Are there other indications that NRC employees are engaging at work in activities not directly related to their employment?

Answer:

The Agency does not permit significant use of Agency equipment, or official time, by employees for purposes unrelated to Agency business. Several instances of abuse have been reported to or were observed by management over the past several years. Those known to management have been addressed through counseling or discipline of the employee. The specific disciplinary action in each case was determined based on such factors as the nature and extent of the misconduct, the nature of the employee's position, the employee's past disciplinary record and performance and whether the employee's conduct was criminal in nature. There is no current record of similar misconduct having occurred within Region IV.¹ Currently, there is

¹ Your letter refers to two employees escorted from Region IV by Federal agents for improper activities. These two individuals are no longer employed by the NRC. The extent to which others may have been involved in misconduct of the kind allegedly committed by the two former employees, including possible misuse of official time or Agency facilities, will be more

one Agency employee (not in Region IV) who has allegedly engaged in inappropriate use of the Agency's computer system. This case is now under review by management. I have been advised that there is no basis to suspect that there are systemic or widespread instances of NRC employees improperly using official time or NRC equipment for matters unrelated to the Agency's business.

Question (8):

[

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Moreover, I am confident in NRC's ability to communicate with nuclear power plants during a national disaster or a military or terrorist attack. In March, 1999, as today, NRC primarily relies on ground lines for telecommunications with power reactors in response to any emergency affecting the site. In the event of a localized disruption of the telecommunications system, as occurred at the Turkey Point Nuclear Power Plant during and after Hurricane Andrew in 1992, NRC has cellular telephones that can be used for emergency response communications. In addition, NRC maintains INMARSAT satellite telephones at each of its regional offices that can

clear when the OIG issues its report in the matter and the matter is carefully reviewed.

be dispatched to nuclear power plants that are potentially threatened by hurricanes, or other natural disasters, in advance of such occurrences. These telephones provide backup communication capability if ground and cellular telephone communications are disrupted. NRC routinely tests its INMARSAT units and our staff is confident of their reliability.

In August 1999, NRC distributed Iridium satellite telephones to all regional and resident inspector offices in support of its Y2K preparedness activities. The purpose of this action was to be ready if the Y2K transition resulted in a widespread disruption of the telecommunications system across the United States. The Iridium telephones were tested to verify their operability in advance of the Y2K transition. Although there were no deficiencies in their operation, NRC quickly learned that the Iridium telephones, like INMARSAT terminals, have limited usefulness in emergency response. Accordingly, although NRC continues to use the Iridium satellite telephones as part of its backup emergency response communications system, we continue to rely primarily on ground and cellular telephones. These are augmented by our INMARSAT units and the recently reactivated Iridium units to respond to situations where a localized disruption of the telecommunications system has occurred.